No. 88-60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OHIO POWER COMPANY,
Petitioner,

v.

LEE M. THOMAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER OHIO POWER COMPANY

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REPLY BRIEF FOR PETITIONER OHIO POWER COMPANY

ARGUMENT

In this case, Petitioner seeks review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit holding that the U.S. Environmental Protection Agency ("EPA" or "the Agency") was not precluded under the Administrative Procedure Act ("APA") from promulgating a legislative regulation that revokes a final order issued to Ohio Power Company under § 123(c) of the Clean Air Act, 42 U.S.C. § 7423(c) (1982), when § 123(c) does not explicitly provide EPA with authority to do so. Federal Respondents advance several arguments in opposition to certiorari.[1] For the reasons discussed below, Federal Respondents' arguments are without merit.[2]

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[1] Brief of Federal Respondents in Opposition at 20-24 (hereinafter "Fed. Resp. Brief ——").

[2] Federal Respondents in a footnote object to Petitioner's Motion to Defer Consideration of the Petition in this case pending this

CERTIORARI SHOULD BE GRANTED TO SETTLE THAT REGULATIONS UPSETTING PAST TRANSACTIONS BETWEEN THE GOVERNMENT AND PRIVATE PARTIES ARE PROSCRIBED UNDER THE APA IN THE ABSENCE OF EXPLICIT AUTHORITY IN AN AGENCY'S ENABLING STATUTE FOR SUCH RULES.

The scope of an agency's authority to regulate depends upon the congressional delegation. Inherent in any delegation of regulatory authority is the power to control the future conduct of regulated parties. As the APA makes clear, regulation of future conduct is the centerpiece of rulemaking—i.e., "rules" are statements of "future effect." [3]

Prescribing rules for the future will necessarily restrict a person from engaging in conduct that he could lawfully have undertaken in the past. That is a necessary consequence of rulemaking, and is not questioned by Petitioners in this case or in *Georgetown*. A delegation of authority to prescribe rules for the future, however, does not provide, without more, authority to reverse blithely transactions with the government completed under prior rules. That is, a new rule that impinges on *"transactions or considerations already past"* [4] can no longer be characterized as a rule that has a purely "future effect."

Court's decision in Bowen v. Georgetown University Hospital, No. 87-1097 (*"Georgetown"*). Fed. Resp. Brief 22 n.14. For reasons discussed herein and in the Petition filed in this case, the administrative law issue in this case and the issue in *Georgetown* are virtually identical. *See also* Brief of Ohio Power Company as *Amicus Curiae* in Support of Respondents, filed on August 4, 1988, in *Georgetown*. For these reasons and those stated in Petitioner's Motion, the Motion to Defer Consideration of this Petition until *Georgetown* is decided should be granted.

[3] 5 U.S.C. § 551(4) (1982).

[4] Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (emphasis added).

In evaluating the validity of a rule that impinges on past transactions between the government and a private party, such as administrative orders, it is necessary to turn for guidance to the underlying congressional delegation and the APA. Where Congress has delegated to the agency authority to revoke orders issued in the past, the agency may revoke such orders by rule notwithstanding the APA. In so doing, however, the agency should consider whether the public interest in retroactivity outweighs the hardship that reversal of the agency's position would cause the affected party.

Where Congress has *not* delegated to the agency authority to revoke past orders, however, the APA, which must be read into every agency's general delegations,[5] precludes an agency from adopting a rule that upsets rights granted in those orders.[6] As the D.C. Circuit recognized in *Georgetown*, it is this latter category of rules —i.e., rules that not only establish new legal requirements for the future, but that also revoke past transactions between the government and a private party—that

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[5] *See* Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954) (Given the focus of the APA on the overall limits of agency authority, "the Administrative Procedure Act . . . must be read as part of every Congressional delegation of authority, unless specifically excepted.").

[6] If that person has *not* received a final determination (e.g., an administrative order) from the agency, but rather has relied upon a legal principle established in a rulemaking or adjudication, a new rule that changes that legal principle for the future is not proscribed. However, as Federal Respondents recognize, Fed. Resp. Brief 22-24, in order to avoid injustice, agencies will balance the adverse effect of the change in legal principle on a person who relied on that principle with the public interest in broad application of the new rule. *See* Sierra Club v. EPA, 719 F.2d 436, 467 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984); Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972). This type of rule is not questioned by Petitioner.

is inconsistent with the APA's definition of a rule as a statement of "future effect." [7]

Federal Respondents argue that this case can be distinguished from *Georgetown* on the grounds that a regulation that upsets a past transaction with the government leading to restrictions on "future emissions" is not proscribed, while a regulation that involves future "monetary reimbursements for past transactions" is.[8] This simplistic distinction does not withstand analysis.

The applicability of the APA proscription does *not* turn on whether a regulation affects "future conduct." *All* regulations affect future conduct. In *Georgetown*,

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[7] Georgetown University Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987); *see* Petition for a Writ of Certiorari at 10-14 (hereinafter "Pet. ——"). Given the historical view that laws apply only to the future, the authority of an agency to change established rights retrospectively does not depend upon the type of transaction in which the rights were established. Thus, just as an agency may not revoke an administrative order through rulemaking without explicit congressional authority, where a person was a party to a prior adjudication, rights established for that party in that adjudication may not later be revoked in a subsequent adjudication absent explicit statutory authority to do so. *See* United States v. Seatrain Lines, Inc., 329 U.S. 424, 430-33 (1947) (the Interstate Commerce Commission cannot revoke a certificate of public convenience and necessity previously issued to a water carrier, given the absence of explicit statutory authority); American Methyl Corp. v. EPA, 749 F.2d 826, 834-40 (D.C. Cir. 1984); Hirschey v. FERC, 701 F.2d 215, 220 (D.C. Cir. 1983); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 291 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Chapman v. El Paso Natural Gas Co., 204 F.2d 46, 53-54 (D.C. Cir. 1953).

[8] Fed. Resp. Brief 21. This is the same superficial grounds for distinction used by the court below. The illogical nature of this distinction is the very reason why certiorari is important to clarify the proper scope of rulemaking under the APA.

the rule affects the hospitals' future cash flow; in this case, the rule affects future emissions. The crucial consideration raised in the Petition, which Federal Respondents refuse to address, is whether the regulation not only addresses future conduct, but also upsets previously established legal rights and obligations.[9] Under the APA and the D.C. Circuit's decision in *Georgetown*, such regulations are proscribed *unless* the statute being implemented by the agency explicitly authorizes such regulations.[10]

Applying the APA, the lower court in *Georgetown* held that the regulation at issue was invalid because it affected the hospitals' continuing right to money received under a previous administrative determination. The lower

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[9] *See* Pet. 10-11 and note 21. Federal Respondents deem critical to this case whether a rule causes a regulated party to suffer a penalty stemming from past conduct. Fed. Resp. Brief 21. Without such an impact, Federal Respondents contend that a rule is valid. However, in the rule involved in *Georgetown*, which Federal Respondents do not question is retroactive, the hospitals are *not* being penalized for having received money under an earlier rule to which they are not entitled under the new rule. Rather, the hospitals are being required in the future to give back something of value that under the relevant statute they believed would always be theirs.

[10] Pet. 11 and note 25. An illustration of this principle occurs in the context of the ongoing controversy over whether the Department of Transportation (DOT) should adopt regulations requiring the installation of air bags in automobiles. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). Under the statute at issue, a manufacturer could clearly be required to include air bags in future model year cars. However, he could not be required to retrofit air bags in cars produced in past model years under the seat belt regulations, since the statute does not give the DOT authority to engage in retroactive rulemaking. 15 U.S.C. § 1392 (1982). While each regulation would obviously only impact the manufacturer's "future conduct," the latter is prohibited under the APA since it upsets previously established legal rights and obligations arising when past model year cars were built.

court found that the Medicare statute does not explicitly authorize such retroactive regulation.

Similarly, in this case, the regulations at issue affect Ohio Power Company's "good engineering practice" stack height credit previously approved by EPA pursuant to the procedures in § 123(c) of the Clean Air Act.[11] Sec-

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[11] Federal Respondents suggest, although they never explicitly argue, that the approval of stack height credit for Ohio Power's Kammer Plant was not the product of a completed transaction with the agency, because a "mid-level" EPA employee gave the approval. Fed. Resp. Brief 10 n.7. At the outset, the approval was not given by an obscure mid-level employee of EPA—it was given by the Acting Chief of Air Programs for EPA Region III (the Region in which the plant is located). Moreover, in the long history of this proceeding, this is the first time that Federal Respondents have ever even implied that EPA's approval was not authoritative and final or that the EPA official sending the letter approving the stack height credit had no authorization to do so. *Cf.* Brief for Respondents in Nos. 86-1331, *et al.* (D.C. Cir.) at 12 ("EPA finally approved the [Ohio Power] fluid modeling demonstration [for Kammer] . . . by letter of October 6, 1982"). In any event, the law is clear that an EPA determination can be "final" even if not issued by a "high-level" employee. *See* NRDC v. Thomas, 845 F.2d 1088, 1094 (D.C. Cir. 1988).

Federal Respondents also suggest that the court below found only that the rule "might have" a retroactive effect, not that it did have such an effect. Fed. Resp. Brief 23-24 n.17. In fact, the court was not questioning whether the regulation was retroactive as applied to Ohio Power; it accepted that characterization of the rule, Pet. 12-13 and note 30, a characterization made by EPA itself. *See* Brief for Respondents in Nos. 86-1331, *et al.* (D.C. Cir.) at 20 ("These new requirements were made retroactive to all sources which conducted demonstrations after December 31, 1970"). The court was only expressing the view, with which petitioners disagree, that the retroactivity may not be unduly burdensome. The degree of the burden of retroactivity is an issue only if the balancing test applies; that is, it is only an issue where the rule changes the legal standards for the future but does not disturb past orders. *See supra* note 6.

Finally, Federal Respondents note in passing that Ohio Power had already constructed Kammer's stack before § 123 was enacted,

tion 123(c) does not explicitly authorize EPA to revoke stack height credit granted after notice and an opportunity for comment in an administrative proceeding under that provision.[12] Accordingly, the administrative law principle applied in *Georgetown* is equally applicable in this case.

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and therefore that the demonstration was "after the fact." Fed. Resp. Brief 24 n.18. This point has no significance except to highlight Federal Respondents' confusion concerning § 123. Under § 123, it is irrelevant that a stack was in existence before enactment of § 123 in 1977, since § 123 applies to all stacks in existence after 1970.

[12] Federal Respondents do not dispute that § 123(c) nowhere provides explicit authorization for EPA to revoke a prior approval of a stack height demonstration. Rather, Federal Respondents suggest that EPA has such authority through § 110(a)(2)(H) of the Act, 42 U.S.C. § 7410(a)(2)(H). Fed. Resp. Brief 22. Federal Respondents are confused. While § 110(a)(2)(H) prescribes procedures requiring revisions to state implementation plans to meet new requirements mandated under the Act, it says nothing about the substantive nature of those requirements. The terms of the specific statutory provisions referred to generally in § 110(a)(2)(H) will determine whether the requirements to be applied to a particular source are those established under prior rules or those established under revised rules. Many of the Act's provisions, including § 123(c), contain no authority to apply new rules to those subject to standards or orders established under prior rules.

For example, once EPA determines what control technology represents "best available control technology" (BACT) for a source under § 165(4) of the Act, 42 U.S.C. § 7475(4), the Agency lacks authority to revoke that BACT determination later and impose a more stringent technology on that source. Moreover, once EPA establishes an NSPS for a source category under § 111, any revision to that NSPS cannot apply to sources already built that are subject to the previous NSPS. Similarly, once EPA determines that a certain stack height represents "good engineering practice" pursuant to a § 123(c) demonstration, the statute does not provide the Agency with authority to reevaluate and revoke that determination. Accordingly, once requirements are established under these provisions, they are not subject to change under § 110(a)(2)(H) (or any other section of the Act).

Contrary to Federal Respondents' argument,[13] *Citizens to Save Spencer County v. EPA*[14] confirms that the *Georgetown* prohibition on retroactive rulemaking is implicated in this case. Federal Respondents contend that the regulation in *Spencer County* "applied to past conduct and declared that the conduct had been unlawful at the time it took place."[15] Federal Respondents mischaracterize the regulation at issue in that case.

The regulation in *Spencer County* did not declare as unlawful construction activities that had already taken place. Rather, it imposed new requirements (which would apply in the future) on plants that had already begun construction or been permitted under an earlier set of requirements, even though the Act provides no authority for such a rule.[16] Thus, the new regulation was retroactive, having affected prior administrative determinations by establishing requirements affecting the *future emissions* of plants that had already begun construction.[17]

Spencer County therefore shows that the fact that a regulation affects "future emissions" is not relevant to whether it is a regulation proscribed by the APA. Thus,

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[13] Fed. Resp. Brief 21 n.13.

[14] 600 F.2d 844, 879-81 (D.C. Cir. 1979).

[15] Fed. Resp. Brief 21 n.13.

[16] The principal effect of the new requirements was to change the control technology applicable to such sources, i.e., to affect those sources' "future emissions." Contrary to Federal Respondents' suggestion, there were no penalties exacted under the rule for having constructed a source without having met the new requirements that did not exist when construction commenced. *See supra* note 9.

[17] While the court in *Spencer County* condemned retroactive regulation under the APA, it upheld the rule in question only because EPA had justified the rule's retroactivity under the APA's "good cause" exception. *See* Pet. 13 n.20. No one contends that the "good cause" exception is applicable in this case.

the distinction raised in this case by the court below, and argued by Federal Respondents here, as to why the principle established in *Georgetown* does not apply, makes no sense. Regulation that revokes rights established in a past transaction with the agency, thereby resulting in future burdens (e.g., through future, additional controls on "future emissions" in this case and through future repayments to the government in the *Georgetown* case), is rulemaking proscribed by the APA in the absence of an explicit congressional delegation of authority.[18]

Finally, given Federal Respondents' confusion as to the type of "retroactivity" proscribed by the APA, it should be clarified that Petitioner does not argue that the regulations involved here cannot be applied to sources, unlike Ohio Power's Kammer Plant, that have *not* demonstrated a stack height credit under § 123(c). If a source (even a source constructed before promulgation of the rules) desires to establish a stack height credit pursuant

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[18] Federal Respondents also attempt to distinguish two of the cases cited by Petitioner establishing the principle that an agency may not revoke a previous administrative determination without explicit statutory authority. (A third case—a case from this Court—is not mentioned by Federal Respondents.) Pet. 12 n.27; Fed. Resp. Brief 22-23 n.15. By citing American Methyl Corp. v. EPA, 749 F.2d 826, 834-40 (D.C. Cir. 1984), Petitioner did not suggest, as Federal Respondents state, that EPA had no authority to revoke the administrative determination at issue in that case. Instead, the case establishes that EPA had authority to revoke only pursuant to a statutory provision explicitly providing such authority. By comparison, neither § 123(c) nor any other section of the Act authorizes revocation of a stack height credit approved under the procedures in § 123(c).

Federal Respondents also misread Utah Int'l, Inc. v. Andrus, 488 F. Supp. 976, 984-87 (D. Colo. 1980). In that case, a district court refused to allow the government to change a determination made under a regulation after that regulation was revised, allegedly in furtherance of the statutory objective. The facts of that case are therefore completely analogous to the facts of this case.

to § 123(c) at this time or in the future, it must meet the new requirements. Petitioner does contend, however, that once a § 123(c) credit is approved by EPA, the Agency lacks authority under the APA and the Clean Air Act to promulgate new regulations that revoke the prior approval.

CONCLUSION

For the foregoing reasons and the reasons presented in the Petition for a Writ of Certiorari, this Court should grant certiorari to define the limits of an agency's authority to adopt retroactive regulations.

Respectfully submitted,

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